STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB GROUP INSURANCE COMPANY,

Plaintiff-Appellee,

v

JACQUELINE WORTHEY and PRISCILLA WELLS,

Defendants,

and

DORETHY ROBINSON, as Next Friend of MM,

Defendant-Appellant.

UNPUBLISHED
August 5, 2014

No. 315715
Macomb Circuit Court
LC No. 2013-000031-CK

Before: JANSEN, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendant Dorethy Robinson ("Robinson"), as next friend of MM, a minor, appeals the trial court's order that granted summary disposition to plaintiff Auto Club Group Insurance Company ("Auto Club"). For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

This case originates in a series of sexual assaults committed by Leroy Wells ("Leroy") against MM at defendant Jacqueline Worthy's ("Worthey") home. At the time of the specific incident relevant to this case, Leroy was 14 years old and MM was four years old. MM's babysitter, defendant Priscilla Wells (no relation to Leroy), brought MM to Worthey's house. According to Worthey, the boys got muddy while playing outside, so she instructed them to take a shower, which they did together. Leroy sexually assaulted MM in the shower by putting his penis into MM's mouth. MM told Robinson of this assault (and two other incidents at Wells' home where Leroy had sexually assaulted him) in November 2010. Leroy was subsequently charged with two counts of criminal sexual conduct and pled no contest.

Robinson filed suit against Wells and Worthey, and alleged various negligence-related claims. Auto Club, concerned that it might be held liable for Robinson's claims because of its status as Worthey's insurer, then brought this action. It asked the court for a declaratory judgment stating that it had no obligation to provide coverage for the incidents alleged in Robinson's complaint, and accordingly had no duty to defend or indemnify Worthey. Both Auto Club and Robinson filed motions for summary disposition. The trial court granted Auto Club's motion under MCR 2.116(C)(10), and held, among other things, that the insurance policy explicitly excluded coverage for incidents of sexual assault. Robinson appeals and argues that the trial court erred when it granted Auto Club's motion for summary disposition.

II. STANDARD OF REVIEW

A trial court's decision to grant or deny a motion for summary disposition is reviewed de novo. *Walters v Nadell*, 481 Mich 377, 382; 751 NW2d 431 (2008). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A court must consider the pleadings as well as affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party." *Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). If "the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden*, 461 Mich at 120.

"An insurer may utilize this procedure in a declaratory action to determine whether it must indemnify and provide a defense for an insured in an underlying tort action." *Allstate Ins Co v Freeman*, 432 Mich 656, 662; 443 NW2d 734 (1989). In such a case, " 'it is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists . . . . [S]o must the allegations be examined to determine the substance, as opposed to the mere form, of the complaint.' " *Id*. at 662–663, quoting *Illinois Employers Ins of Wausau v Dragovich*, 139 Mich App 502, 507; 362 NW2d 767 (1984).

"Further, the construction and interpretation of an insurance contract is a question of law" that is reviewed de novo. *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

III. ANALYSIS[1]

[1] Though Robinson asks us to find that Leroy's sexual assault constitutes a coverable "occurrence" under the insurance policy, we need not decide this issue because, even if the sexual assault was an "occurrence," Robinson's claim fails for the reasons explained below.

Moreover, the issue is moot. "An issue is moot if an event has occurred that renders it impossible for the court to grant relief." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 472; 761 NW2d 846 (2008). The trial court held that Leroy's sexual assault was an "occurrence," and Auto Club does not ask us to reverse this decision—rather, it states that "this Court need not address" the issue. Accordingly, we will not review the issue, because it is

"[A]n insurance contract must be enforced in accordance with its terms." *Henderson*, 460 Mich at 354. Although "the exclusions to the general liability in a policy of insurance are to be strictly construed against the insurer," "[c]lear and specific exclusions must be enforced." *Group Ins Co of Mich v Czopek*, 440 Mich 590, 597; 489 NW2d 444 (1992). "An insurance company cannot be found liable for a risk it did not assume." *Id*. "[C]overage under a policy is lost if any exclusion within the policy applies to an insured's particular claims." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992). To determine the scope of coverage, we "look to the underlying cause of the injury to determine coverage and not to the specific theory of liability." *Freeman*, 432 Mich at 690 (quotation marks and citations omitted).

Here, the "underlying cause" of MM's injuries is Leroy's sexual assault. And the insurance policy at issue explicitly excludes coverage for damages that arise from sexual assault. Exclusion 6 of Part II of the insurance policy states that Auto Club does not provide coverage for "bodily injury or property damage arising from sexual molestation, corporal punishment or physical or mental abuse[.]" Accordingly, the insurance policy does not provide coverage for Leroy's sexual molestation of MM.

Because the sexual molestation exclusion precludes coverage, it is unnecessary to determine whether coverage is also precluded by any other exclusion. See *Auto-Owners Ins Co*, 440 Mich at 567. But coverage of Leroy's conduct is also excluded by the policy's criminal act exclusion. Exclusion 10 of the policy states that plaintiff does not cover:

> [B]odily injury or property damage resulting from:
>
> a. a criminal act or omission committed by anyone; or
>
> b. an act or omission, criminal in nature, committed by an insured person, even if the insured person lacked the mental capacity to:
>
> (1) appreciate the criminal nature or wrongfulness of the act or omission; or
>
> (2) conform his or her conduct to the requirements of the law; or
>
> (3) form the necessary intent under the law.

Here, Leroy's conduct was criminal in nature: as a result of his sexual assault on MM, he pled no contest to first-degree criminal sexual conduct. Because part (a) of Exclusion 10 precludes coverage for bodily injury resulting from the criminal acts of anyone, this exclusion also bars coverage for MM's injuries.[2]

"impossible for the court to grant relief"—the trial court interpreted the policy in a way that Robinson desired, and Auto Club does not ask us to review this interpretation. *Id*.

[2] Robinson's arguments on the supposedly distinct nature of her causes of action are both unpreserved and irrelevant—unpreserved because the trial court did not address these assertions; irrelevant because, whatever form in which Robinson couches her claims, the insurance policy

Accordingly, the trial court correctly granted summary disposition to Auto Club.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Pat M. Donofrio

explicitly excludes coverage for Leroy's sexual assault of MM. "Generally, an issue is not properly preserved if it is not raised before, and addressed and decided by, the trial court." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005).